

DEATH PENALTY COSTS

A Report Prepared for the
Legislative Finance Committee

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INTRODUCTION

The purpose of this study was to examine whether the difference in costs when the death penalty is sought is significantly greater than when it is not sought. It was hoped that this study would be done by this point, but issues with provision of information have caused a delay. Therefore, this update summarizes the study approach and some of the information gathered so far.

It was determined that a study from scratch would be a very time consuming process with little chance of providing a high utility result with the staff time and resources available. Therefore, in consultation with Senator Wanzenried, staff embarked on the following.

STUDY METHODOLOGY

The question was asked: given the staff time and resources available, how can LFD staff provide the greatest value, and add something to the information already there or assist the legislature in getting the necessary information in the future? How is this done by working off what has already been done both in Montana and in other states?

- There is some literature that discusses the components needed in order to determine costs of death penalty cases and how they compare to similar cases where the death penalty is not sought
- Two major studies were done in other states: Duke University (North Carolina) in 1993 and Maryland in 2008
- The Montana American Civil Liberties Union (ACLU) gathered some data in an attempt to determine the difference in costs, but did not complete the project
- The fiscal notes for SB 236 in the 2009 Legislative Session and SB 185 in the 2011 Legislative Session stated they were unable to determine the cost differential between the death penalty and a life sentence with no possibility of parole

Given this information, staff will begin the following and accomplish as much as possible in the time available:

- Compare the information gathered by the Montana ACLU to the types of information the available literature says are necessary to determine if any major holes exist, and determine what major information is not included
- Determine whether the missing information is available
- Provide options for the legislature if the information is not available
- To the extent that it is feasible, determine if Montana is similar enough to the either North Carolina or Maryland to determine if there is enough comparability to apply the general results of either study to Montana

The following summarizes some of the information gathered at this point.

STUDIES BY OTHERS

A review of selected studies to identify the cost differential between capital and non-capital sentencing identified the following statistics.

Duke University Study – North Carolina

A 1993 study conducted by faculty and staff at Duke University¹ compared the resource costs of adjudicating murder cases capitally and non-capitally in North Carolina. The study found that “the extra costs to the North Carolina public of adjudicating a case capitally through to execution, as compared with a noncapital

¹ “The Costs of Processing Murder Cases in North Carolina”, Terry Sanford Institute of Public Policy, Duke University, Philip J. Cook, Ph. D., Donna B. Slawson, M.A. J.D., with assistance of Lori A. Gries B.B.A., May 1993.

adjudication that results in conviction for first degree murder and a 20-year prison term, is about \$329,000.” The report stated that the estimated \$166,000 savings in prison costs that resulted from executing instead of housing the convicted defendant. The only cost area the study identified that was lower for capital cases compared to non-capital cases was imprisonment cost.

Further analysis of this study would be needed to determine a comparison for the alternative of a sentence of life in prison without parole instead of the 20-year term used in this study. Extending the prison term to life would reduce the savings identified in the study. Further research is also needed to determine the comparability between Montana and North Carolina death penalty laws and procedures. This research would likely require involvement of legal staff.

Urban Institute Justice Policy Center – Maryland

A more recent study conducted by the Urban Institute Justice Policy Center tested whether the death penalty resulted in additional costs to Maryland taxpayers. The research found that both the filing of a death notice and the imposition of a death sentence added significantly to the cost of the case. According to the report², “For the average case, a death notice adds \$670,000 in costs over the duration of a case. A death sentence adds an additional \$1.2 million in processing costs. The average total cost for a single death sentence is about \$1.9 million over the cost of a similar case with no death penalty sought.”

This study relied on significant researcher time reviewing information from thousands of cases and developing a database to record data findings. Data was gathered by reviewing official records and files for the cases, interviewing and surveying staff, attorneys, and judges.

CURRENT MONTANA DEATH PENALTY CASES

A case is currently being adjudicated in Flathead County in which the county attorney is seeking a capital sentence³. However, with this case only partially through the initial adjudication phase, using cost data from it would only provide part of the picture to how much a death penalty case costs. It also only portrays one side of the equation in comparing a death penalty to a life sentence. In order to form a basis for comparison, data needs to also be collected for death penalty qualified cases in which a life sentence is sought.

Beginning to gather information now and requiring that all parties involved in other deliberate homicide or aggravated kidnapping cases collect costs for those cases would lay the ground work for gathering data for a comparative cost study in the future.

MONTANA COSTS

If the legislature wanted to pursue original research to determine the cost differential between capital and non-capital cases specific to Montana, several factors need to be considered including what costs to identify, what type of cases to consider, data availability and limitations, and staff and other entity resource involvement.

Costs to Consider

Costs that need to be considered when comparing capital to non-capital cases include:

- Prosecution
- Defense (only for cases defended with public funds)
- Expert witness
- Security
- Transportation
- Corrections

² “The Cost of the Death Penalty in Maryland”, Urban Institute Justice Policy Center, John Roman, Aaron Chalfin, Aaron Sundquist, Carly Knight, Askar Darmenov, March 2008.

³ Tyler Michael Miller on two counts of deliberate homicide for a December 25, 2010, shooting of two people in Kalispell.

Types of Cases to Consider

In order to provide a fair cost comparison for capital cases against non-capital cases, cost profiles should be determined from a representative sampling of cases punishable by death⁴ for each of the following case categories:

- Death was sought and imposed
- Death was sought and not imposed or overturned
- Death was not sought

Complications of Data Availability

Capital cases often take several decades to resolve and this extended period poses complications on the availability of data needed to determine case costs. Since the current death row inmates in Montana were prosecuted more than two decades ago inquiries have found that data needed to fully determine their costs are not available and what is available would be very time consuming to identify. This is because no one was aware that the costs incurred for these two cases would be required some 20 years later to support a study such as is proposed.

Experience with capital cases in Montana and nationally is that once guilt has been determined and a capital sentence imposed, the convicted individual remains on death row for tens of years while multiple appeals are presented and deliberated on. Montana's two current death row inmates have been on death row since 1983 (28.5 years) and 1992 (19.5 years). According to the Department of Corrections, the average time an inmate stays on death row in Montana is 18 years.

During the period from conviction to execution the appeals process continues to accumulate costs that may have yet to be incurred. Therefore, the use of these two death row inmate's cases in a cost comparison study may still not show the full costs of the cases.

Changes Over Time

From the time a criminal act punishable by death was committed until the individual is either executed or dies of natural or other causes the governmental entities responsible for funding various adjudication costs can and have changed. Since 2002, the legislature has made significant changes in court and defense funding responsibilities. The 2011 Legislature passed district court assumption legislation that moved district court costs under the funding responsibility of the Montana Supreme Court. This act moved responsibility for certain court costs from counties to the state. The 2005 Legislature established the state public defender system and moved public defender costs from counties to the state. Accompanying these changes in funding responsibilities were changes in practices for how costs are recorded and controlled for portions of the associated cases. Although these changes would likely make recent cost data more accessible the data availability from prior periods is dispersed and disparate. Given the multiple decade length of capital cases, availability of older cost data is proving to be difficult to obtain.

Judge, Attorney, and Staff Time

Judges, attorneys, and their respective staff involved in adjudicating the types of cases that would be involved in a study of Montana capital cases work on a number of cases in addition to those of interest. In order to determine their personal services contribution to the cases that would be included in a study, prorated time calculations based on staff pay and administrative load standards are typically used to derive a cost estimate.

Corrections Costs

Corrections costs are among the more straightforward to estimate. Individuals sentenced to the Department of Corrections are housed according to their risks and not specifically the crimes they are convicted of, except that

⁴ In Montana the death penalty may be imposed for a deliberate homicide or aggravated kidnapping.

individuals sentenced to death are housed in the maximum security unit. Other inmates could move to different custody levels during their time of incarceration, whether they were convicted of a capital qualified crime or other crime. The maximum security unit currently costs \$57,700 per year compared to \$34,341 per year on average for the state prison, or \$23,359 more per year for death row inmates. The differential factor between the two classes of inmates is that once executed, the incarceration costs for the capital inmate cease and the foregone costs are a savings to the state but offset by the costs to carry out the execution. There is an additional cost of \$49,500 to execute the inmate that must also be factored into the comparison.

Non-correctional Costs

Savings in corrections costs are offset by other costs that, according to studies made in other states, are typically higher for capital cases. From the point when a death sentence is declared until an execution is carried out, state and local governments incur costs that are higher than non-capital cases for several reasons:

- Defense council must be trained and certified to defend death penalty cases
- Two defense council attorneys are required for capital cases
- Automatic appeal is granted when convicted in capital cases
- Capital cases tend to be more complex and therefore involve more motions, more forensics analysis, and more expert witnesses

LEGISLATIVE CONSIDERATION

Unless the committee directs it to do otherwise, staff will continue, as time is available, to pursue the items mentioned above under the heading Study Methodology. Options the committee may want to consider are:

- Limit the scope of further work to determining the validity from studies already done in other states to Montana
- Evaluate the work done by the Montana ACLU and identify if it could be used and, if so, what would be needed to use it to come to a reasonable cost comparison for Montana
- Limit the scope of staff work to continuing to find out what data is available and reevaluate the scope of the study when this has been determined
- Limit the work on this study to identifying options to collect data for a future study
- Suspend work on this study